

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM D. HARE,

Defendant-Appellant.

UNPUBLISHED

April 12, 2002

No. 229936

Genesee Circuit Court

LC No. 00-005910-FH

Before: K.F. Kelly, P.J. and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant appeals by right from jury convictions of operating under the influence of liquor (“OUIL”), third offense, MCL 257.625(8)(c), fourth-degree fleeing and eluding, MCL 750.479a(2), and driving on a suspended license, MCL 257.904(3)(a). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to five to twenty years’, five to fifteen years’, and ninety-three days’ time served, respectively. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the court erred in denying his request to instruct on the defense of necessity or to instruct on his theory of the case. This Court reviews a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

Necessity is a defense based on compulsion. *People v Hocquard*, 64 Mich App 331, 337, n 3; 236 NW2d 72 (1975). It requires a well-grounded apprehension or reasonable fear of a present, imminent, and impending threat of death or serious bodily harm occasioned by natural physical forces if the act is not done. *Id.*; *People v Hubbard*, 115 Mich App 73, 77-78; 320 NW2d 294 (1982). A threat of future injury is insufficient. *Id.* at 78.

Defendant offered two alternate bases for his request. The threat of the arrest of Matthew Couture, the other occupant of the vehicle, did not present an imminent threat of death or serious bodily harm and thus did not support the requested instruction. Assuming one could infer that defendant took the wheel in order to stop Couture from speeding, the evidence still did not show that he was under a threat of present, imminent, impending danger. While Couture was allegedly driving at a high rate of speed, there was no evidence that he was driving erratically, that the road conditions were poor, or that there was considerable traffic such that the risk of a crash was

imminent. Therefore, the evidence did not support the proposed instruction and the court did not err in denying the request.

When the court denied the requested instruction, defendant asked that it be given as his theory of the case. Indeed, “when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.” *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). In fact, “a trial court is required to give a requested instruction, except where the theory is not supported by evidence.” *Id.* A theory of the case is distinct from the law by which the case is to be decided; it consists of a short statement regarding the disputed factual issues to be decided and may include those claims supported by the evidence or admitted. MCR 2.516(A)(2).

Because defendant’s proposed theory of the case related not to disputed issues of fact, such as whether he was the driver who was fleeing and eluding the police, but to the legal issue whether his crimes were excused by necessity and, as explained above, the evidence did not support that defense, the trial court did not err in rejecting the proposed instruction.

Defendant next argues he is entitled to resentencing because the sentences for OUIL third and fleeing and eluding were disproportionate. The sentences exceeded the minimum sentence ranges recommended under the statutory guidelines. The trial court’s determination regarding the existence of a reason or factor warranting departure is reviewed on appeal under the clearly erroneous standard. *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000). The trial court’s determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.*

In this case, the court departed upwards from the guidelines by approximately one year and imposed a five-year minimum sentence because defendant had three prior felony convictions, all of which were for OUIL third. The nature of defendant’s prior convictions is clearly objective and verifiable. While the prior record variables take into consideration defendant’s prior felony convictions, MCL 777.52, and the guidelines authorize increased punishment for his habitual offender status, MCL 777.21(3)(c), they do not take into account the fact that defendant poses a continual hazard on the road by perpetually driving on a suspended license while intoxicated despite receiving increasingly harsh sentences for the same misconduct and thus has shown no signs of rehabilitation. Therefore, the court did not abuse its discretion in departing from the guidelines. That being the case, the overall sentence cannot be further reviewed for proportionality. *Babcock, supra* at 78.

Defendant raises two other issues in his supplemental brief. He first contends that he is entitled to a new trial because the prosecutor allowed prosecution witness Steven Moore to present perjured testimony. Defendant failed to raise this issue below and therefore review is precluded unless defendant establishes a plain error that affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

It is the duty of the prosecutor to see that the defendant has a fair trial and to protect the interests of the people, who are as concerned with protecting the innocent as with convicting the guilty. *People v Wilson*, 163 Mich App 63, 65; 414 NW2d 150 (1987). Thus, the prosecutor

may not knowingly use false testimony to obtain a conviction. The prosecutor also has a duty to correct false evidence and advise the defendant and the trial court if a government witness lies under oath. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998).

There is no evidence that Moore lied about the speed of the truck. At best, his testimony conflicted with a statement contained in his police report. That discrepancy was explored by defense counsel on cross-examination. Given that plus the fact that prosecution and defense witnesses testified that the truck was going much slower than Moore testified to, it is unlikely that the discrepancy affected the outcome of the trial.

Defendant further submits he was deprived of effective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Although defendant argues that counsel failed to conduct appropriate pretrial investigation, the record does not disclose any support for the claim. Defendant has not shown that counsel failed to discover and present evidence that would have substantially benefited the defense. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997). Therefore, we cannot find that counsel's performance was objectively unreasonable and the representation was so prejudicial that defendant was deprived of a fair trial. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh